National Medical Associates, Inc. d/b/a Alachua Nursing Center and Oakview Regional Care Center *and* United Food and Commercial Workers Union, Local 1625, AFL–CIO. Cases 12–CA–15743–1, 12–CA–15743–2, 12–CA–16124, and 12–CA–16125

September 8, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

On December 8, 1994, Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent and the General Counsel each filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, National Medical Associates, Inc. d/b/a Alachua Nursing Center and Oakview Regional Care Center, Gainesville and Williston, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(a) and reletter the subsequent paragraphs.

''(a) Notify, in writing, United Food and Commercial Workers Union, Local 1625, AFL–CIO, that it rescinds the March 9, 1994 unlawful withdrawal of recognition from the Union and that it recognizes the Union as the exclusive bargaining representative of the employees in the Alachua and Oakview bargaining units.''

2. Substitute the following for the newly relettered paragraph 2(b) and reletter the subsequent paragraphs.

''(b) Recognize and, on request, bargain with United Food and Commercial Workers Union, Local 1625, AFL–CIO, regarding wages, hours, and working conditions of employees in the following appropriate bargaining unit at Alachua Nursing Center:

> Employees that perform work as certified nurse aids, non-certified nurse aids, dietary aids, cooks, housekeepers and laundry persons, but excluding all other employees;

and, if an understanding is reached, embody the understanding in a signed agreement.

''(c) Recognize and, on request, bargain with United Food and Commercial Workers Union, Local 1625, AFL–CIO, regarding wages, hours, and working conditions of employees in the following appropriate bargaining unit at Oakview Regional Care Center:

> All full time and regular part-time certified nurse aids, non-certified nurse aids, dietary aids, cooks, housekeepers and laundry aids; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act;

and, if an understanding is reached, embody the understanding in a signed agreement. The Union's certification year shall extend 9 months from the date that good-faith bargaining begins.''

3. Substitute the attached notice for that of the administrative law judge.

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[1] In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) of the Act by denigrating the Union and thereby undermining employee support for the Union, we note that the Respondent in its exceptions states that its December 17, 1993 memorandum was directed to ''All Alachua employees'' and was posted only at the Alachua facility. Although the record is unclear regarding the scope of the posting of this December 17 memorandum, we conclude that given all the other reasons relied on by the judge in finding this violation, the possibility that the December 17 memorandum was not posted at the Oakview facility does not affect our finding of this violation with respect to the entire unit, i.e., both the Alachua and Oakview facilities.

[2] The General Counsel has excepted to the judge's failure to include in his recommended Order a provision requiring the Respondent to notify the Union in writing that it has rescinded its withdrawal of recognition from the Union at the Alachua and Oakview facilities, and that it recognizes the Union as the exclusive collective-bargaining representative of the unit employees at Alachua and Oakview. We find merit in this exception, and we shall modify the judge's recommended Order and notice to employees accordingly.

The General Counsel has also excepted to the judge's failure to include in his recommended Order a provision extending the Union's certification year at the Oakview facility for a 1-year period. While we agree with the General Counsel that the nature and scope of the Respondent's unfair labor practices undermined the bargaining process and created disaffection among the employees, we also note that the parties had engaged in several months of apparently productive bargaining prior to the onset of the Respondent's unlawful conduct. In these circumstances, we believe that extending the certification year by 9 months, running from the date that the Respondent begins to bargain in good faith, will more closely restore the status quo ante. *Suzy Curtains*, 309 NLRB 1287 fn. 2 (1992); *Industrial Chrome Co.*, 306 NLRB 79 fn. 2 (1992); *Colfor, Inc.*, 282 NLRB 1173, 1174–1175 (1987), enfd. 838 F.2d 164 (6th Cir. 1988). We shall modify the judge's recommended Order and notice to employees accordingly.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT implement unilateral wage cuts without first providing the Union with requested financial information which we rely on to draw a conclusion that such a cut is a business necessity.

WE WILL NOT implement wage cuts unilaterally which are substantially different from that proposed to the Union.

WE WILL NOT solicit employees to revoke the Union.

WE WILL NOT engage in a course of action designed to undermine the Union as bargaining representative of our employees, including unilaterally restoring wage cuts to employees without giving the Union advance notice and offering to bargain over such matters; offering the Union wage increases on short notice and in a take-it-or-leave-it manner; bypassing the Union and dealing directly with employees; and/or engaging in a campaign to denigrate the Union in the eyes of bargaining unit employees.

WE WILL NOT unlawfully withdraw recognition from United Food and Commercial Workers Union, Local 1625, AFL–CIO, the appropriate bargaining representative of our employees.

WE WILL NOT unilaterally grant employees improvements in wages and benefits after unlawfully withdrawing recognition from the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL notify the Union in writing that we now rescind our March 9, 1994 withdrawal of recognition from the Union, and that we now recognize the Union as the exclusive bargaining representative of our employees in the Alachua and Oakview units described below.

WE WILL rescind our March 9, 1994 withdrawal of recognition from the Union.

WE WILL recognize and, on request, bargain with United Food and Commercial Workers Union, Local 1625, AFL–CIO, regarding wages, hours, and working conditions of our employees in the following appropriate bargaining unit at Alachua Nursing Center:

> Employees that perform work as certified nurse aids, non-certified nurse aids, dietary aids, cooks, housekeepers and laundry persons, but excluding all other employees;

and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL recognize and, on request, bargain with United Food and Commercial Workers Union, Local 1625, AFL–CIO, regarding wages, hours, and working conditions of our employees in the following appropriate bargaining unit at Oakview Regional Care Center:

> All full time and regular part-time certified nurse aids, non-certified nurse aids, dietary aids, cooks, housekeepers and laundry aids; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act;

and, if an understanding is reached, embody the understanding in a signed agreement. The Union's certification year shall extend 9 months from the date that good-faith bargaining begins.

WE WILL make whole all employees for any loss of earnings or any other benefits they may have suffered by reason of the unlawful unilateral reduction in wages by paying them a sum of money equal to the amount they normally would have earned but for such changes.

NATIONAL MEDICAL ASSOCIATES, INC. D/B/A ALACHUA NURSING CENTER AND OAKVIEW REGIONAL CARE CENTER

David M. Anhorn, Esq., for the General Counsel.
Robert W. Rasch, Esq., of Orlando, Florida, for the Respondent.
Edward K. Chambers Jr., of Lakeland, Florida, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case in Gainesville, Florida, on various dates between June 6 and 15, 1994. The charges in Case 12–CA–15743 were filed on August 12, 1993, and thereafter amended. The charges in Cases 12–CA–16124 and 12–CA–16125 were filed on March 15, 1994, and were also thereafter amended. Complaints and amended complaints issued on October 22, 1993, and May 5, 1994. In the amended complaint on May 5, all of the above-captioned cases were consolidated for hearing. As consolidated, the complaint alleges, inter alia, that National Medical Associates, Inc. d/b/a Alachua Nursing

Center and Oakview Regional Care Center (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act, by failing to provide the Union with requested, relevant information; bypassing the Union and dealing directly with employees; implementing a unilateral wage decrease; engaging in a campaign to denigrate the Union in the eyes of bargaining unit employees; participating in soliciting petitions from employees to disaffect the Union; and unlawfully withdrawing recognition from the Union.

In its answer to the consolidated complaint, Respondent admitted certain allegations, including the filing and serving of the charges; its status as an employer within the meaning of the Act; the status of United Food and Commercial Workers Union, Local 1625, AFL–CIO as a labor organization within the meaning of the Act; and the status of certain individuals as supervisors and agents of Respondent within the meaning of Section 2(11) of the Act. Respondent denied having engaged in any conduct that would constitute an unfair labor practice within the meaning of the Act.

At the trial, all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Following the close of the trial, counsel for the General Counsel and Respondent both filed timely briefs that have been duly considered. In addition, counsel for Respondent filed a motion to strike portions of counsel for the General Counsel's brief as misquoting, misstating, and mischaracterizing various portions of the record. Counsel for the General Counsel filed a response thereto. The motion to strike is denied.

On the entire record in this case and from my observation of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

National Medical Associates, Inc. d/b/a Alachua Nursing Center and Oakview Regional Care Center is a Florida corporation operating nursing home facilities in Gainesville and Williston, Florida. Corporate headquarters are located at Marietta, Georgia. In the course and conduct of its business, Respondent annually derives gross revenues in excess of $100,000 at each of the facilities, and purchases and receives at each of the facilities various goods and services directly from sources located outside the State of Florida.

Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

United Food and Commercial Workers Union, Local 1625, AFL–CIO is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

In 1984, the Union was certified as the exclusive collective-bargaining representative of employees at Alachua Nursing Center (Alachua). From that time on, the Union enjoyed a contractual relationship with three successive owners of that facility, including Respondent. The bargaining unit description evolved from that specified in the original certification issued by the Board to the unit specified in the most recent collective-bargaining agreement between Respondent and the Union, which is described as ''employees that perform work as certified nurse aid, non-certified nurse aids, dietary aids, cooks, housekeepers and laundry persons, but excluding all other employees.''

In 1989, National Medical Associates, Inc. was created as a nonprofit corporation, and the Alachua and Oakview facilities were purchased by Respondent. At that time, Respondent adopted the existing collective-bargaining agreement between the Union and Respondent's predecessor at Alachua. That collective-bargaining agreement expired February 14, 1993, but, as more fully discussed below, was extended by the parties a number of times through June 30, 1993.

At Oakview, the Union successfully organized employees in early 1993. The Union was certified by the Board as the exclusive collective-bargaining representative of those employees on March 4, 1993. Contract negotiations for both facilities proceeded from February 1993 until Respondent formally withdrew recognition of the Union at both facilities in March 1994.

B. *Negotiations*

Employees at the Alachua facility were covered by the terms of a collective-bargaining agreement between Respondent and the Union effective by its terms from February 15, 1990, to February 14, 1993. Respondent agreed to various extensions of that contract on February 5 and 25, March 30, April 28, and May 26, 1993. When the parties were not able to reach agreement on the terms of a new contract, the last extension expired on June 30, 1993.

The first negotiation session regarding a new contract at Alachua was held on February 25, 1993. At that meeting, the Union submitted a written contract proposal. James D. Crowe, an attorney employed to represent Respondent in these negotiations, was called as a witness both by counsel for the General Counsel and Respondent. At the time of the trial, Crowe was no longer representing Respondent in any capacity. In this meeting on February 25, the parties first discussed the Union's contract proposal as it related to noneconomic items. After a few hours discussing such items, the parties then came to economic issues. Crowe testified without contradiction he then informed the Union that Respondent's nursing homes were losing money. Later in that same session, the parties again returned to economic issues, and Crowe explained to the Union Respondent's various sources of revenue. Crowe told the Union that Respondent would not be able to agree to any improvements in economic items. Crowe specifically rejected the Union's economic proposals on holidays and wages because the Alachua facility was losing money. It is undisputed that thereafter Crowe rejected all economic proposals advanced by the Union due to the economic conditions at both Alachua and Oakview. Nevertheless, on February 25, Respondent agreed to extend the terms of the existing collective-bargaining agreement through the end of March 1993.

On March 4, the Board certified the Union as the representative of employees at Oakview. On March 30 and again on April 28, Respondent agreed to extend the terms of the collective-bargaining agreement covering employees at Alachua.

On May 25 and 26, the parties again met in contract negotiations. Prior to those negotiations, however, Respondent learned during March and April 1993 of its ever worsening economic condition. In March, Ralph Hildebrand, a manager of the audit division for the Arthur Andersen accounting firm, began an audit of Respondent's books and records. In April 1993, Hildebrand met with Respondent's C.E.O., David Morrel, to warn Morrel that the audit showed Respondent in violation of its debt covenant in the bond agreement with its lender.

During early 1993, Alachua and Oakview were both filled approximately 90 percent by Medicaid patients, and Respondent was thus effectively dependent on Medicaid reimbursements from the State of Florida. In a meeting during March 1993, the president of Volunteer Hospital Authority (VHA), which had been hired to manage the two facilities, notified Respondent that in their opinion everything had been done that could be done to improve and cut costs in the two facilities, and that Respondent would probably have to file Chapter 11 bankruptcy reorganization proceedings. The management firm notified Respondent that in their opinion, if Respondent filed Chapter 11 reorganization, it thought Morrel could buy outstanding bond debt back at 50 cents on each $1 of outstanding debt. Instead, Morrel terminated Volunteer Hospital Authority and took over management of the two facilities himself. On behalf of Respondent, Morrel hired two individuals previously employed by VHA to work directly for Respondent as an administrator and as Respondent's chief financial officer. Together, the three began to focus on ways to cut costs at both Alachua and Oakview.

Last, but certainly not least, in early May 1993, the State of Florida issued a retroactive Medicaid rate adjustment at Oakview in excess of $4 per patient day. This retroactive rate adjustment meant a potential cost to Respondent of approximately a million dollars. Hildebrand, the Arthur Andersen audit representative, informed Respondent that this liability would have to be accrued immediately as a current liability on the balance sheet, thereby adversely affecting the current ratio of assets to liabilities that was already a significant problem. Further, this retroactive rate adjustment meant an immediate cash flow crisis to Respondent.

At both facilities, Respondent looked for every possible way to cut costs, including the renegotiation of lease arrangements, cancellation of contracts for rehabilitation services, changes in food suppliers, and even the renegotiation of lawn maintenance contracts. Respondent's chief financial officer, Marvin Shams, also recommended that Respondent reduce costs by making a 5-percent cut in the wages of all employees at all levels. Shams estimated that over a 6-month period, the wage cut would create a saving of approximately $80,000 to $100,000.

As Respondent's chief executive officer, Morrel authorized Shams to initiate all of these cost saving measures and directed J. D. Crowe to begin bargaining with the Union about the possible wage reduction.

C. *The Reduction in Wages*

On May 25 and 26, Respondent and the Union met and negotiated concerning Alachua and Oakview, respectively. On May 25, the Union modified a number of its economic proposals, including vacations and premium pay. On behalf of Respondent, Crowe advised the Union of Respondent's serious economic difficulties, and again stated that as a result, Respondent could not make or agree to any proposals for increased costs. Discussions continued on the morning of May 25 without anything specific being proposed by Respondent regarding wages.

On the afternoon of May 25, the Union pointed out that it had not received a wage proposal from Respondent, and stated that it needed one. Exactly how the notion of Respondent making a ''final offer'' crept into the discussion on May 25 is not altogether clear, but it is clear that somehow that did occur. Richard Cutshaw, president of the Union, admitted that during the discussion on May 25, Union International Representative Edward Chambers told Respondent that if it was not going to agree to a raise, ''then just give us your final offer.'' Attorney J. D. Crowe, representing Respondent testified, however, he told the Union that if Respondent was forced to put a proposal on the table regarding wages, Crowe would be forced to make a ''final offer.'' According to Crowe, the Union responded, ''Then let's have it.'' In either case, after lunch on May 25, Crowe made an offer on behalf of Respondent that both parties characterized as a final offer. This proposal incorporated a 5-percent cut in wages to a low of $4.25 per hour. This cut was not intended to last the entire life of the collective-bargaining agreement, but was for an indeterminate time until Respondent's economic situation improved.

Union International Representative Chambers immediately responded to Respondent's proposal stating, ''This won't happen.'' Chambers then went on to state, ''There was more than money that was a problem here, but if the owner thinks we are looking at cuts it won't happen.'' During Chambers' testimony, he did not deny telling Respondent that the Union would never accept a wage cut. Rather, when asked if he said that, Chambers impliedly admitted saying that by responding that it was ''not a part of the process.'' I find that Chambers did reply to Respondent's proposal by stating that the Union would never agree to a wage cut. The Union then asked if Respondent was going to give a similar proposal regarding Oakview the next day. On behalf of Respondent, Crowe told the Union that if it was going to force a final offer on Oakview as well, that Respondent would have to do the same thing and put a final offer on the table regarding Oakview similar to the one for Alachua. On May 26, Respondent did in fact make the same proposal for Oakview as it had for Alachua.

It is uncontraverted that in the meetings on both May 25 and 26, the Union asked Respondent to provide it with the financial information that led Respondent to make its wage cut proposal. Respondent agreed to supply the Union with this information.

By letter dated June 16, Morrel sent the Union a copy of a memo ''that will be posted . . . on Monday, June 21, concerning a wage roll back of 5% for all employee.'' The Union was advised that the wage cut would take effect July 1, and the letter stated, ''We expect this wage roll back to last only six months.''

On June 22, Respondent posted notices to employees at both Alachua and Oakview notifying them of the impending wage reduction effective July 1. The notices advised employees that wages were being cut 5 percent, that no employee receiving $4.75 per hour or less would receive a cut in pay, and that the pay cut would last approximately 6 months. On

this same day, Respondent met with employees and advised them of the same information.[1]

On June 29 and 30, Respondent and the Union again met. No one disputed the testimony of Lyle Wilcox, Respondent's director of operations and administrator at Oakview, that the June 29 meeting began by Union International Representative Chambers ''reading the riot act.'' Wilcox testified credibly that during these remarks, Chambers specifically stated the Union was not there to go backward—that it was only there to go forward. After Chambers' remarks, Respondent's representative J. D. Crowe discussed the poor financial condition of both facilities. Crowe informed the Union about many of the conditions that led to Respondent's proposal to temporarily cut wages, but provided the Union with none of the documents that had been requested by the Union. Union President Cutshaw responded, ''Maybe we didn't do a very good job of convincing the owner to meet us half way.'' Chambers added that the Union had been holding off doing anything to try to make Morrel more receptive, but perhaps the Union should caucus and decide what they have to do. International Union Representative Chambers then commented, ''If Morrel thinks we are going to walk away, we are not. If he wants a contract we have made him an offer; if he doesn't, if the Union dies, the facility dies.'' It is undisputed that at these meetings on June 29 and 30, the Union again requested Respondent to provide it with documentary financial data to support Respondent's claim of financial distress. Respondent agreed to supply this documentary evidence.

On July 1, Respondent implemented the wage cut as described in its June 22 notices to employees.

On July 9, Respondent provided the Union with some of the requested financial documentation. On August 4, additional information was given to the Union.

On August 4, Respondent and the Union again met in negotiations. It is undisputed that at this meeting the Union made a counterproposal to Respondent's wage cut. The Union proposed that instead, Respondent freeze wages and reduce vacation benefits. Respondent rejected these proposals because they would not represent any actual, immediate help to Respondent. In response, the Union again said they were not going to accept a wage cut ''period.'' At the end of this meeting, the parties scheduled another bargaining session for late August. Before that meeting took place, however, the Union canceled the meeting.

On August 16, 1993, the Union sent letters to Alachua and Oakview employees reiterating that they did not organize a Union to go backwards. Union President Cutshaw also stated: ''We will not agree to the pay cut not will we agree with any benefit cuts.'' These letters are completely consistent with Respondent's other credible testimony that from the very outset, as soon as Respondent proposed a wage cut, the Union responded that it would never agree to any pay or benefit cut.

[1] One of counsel for the General Counsel's witnesses, Kasinal Lee, called as a rebuttal witness, testified that in this meeting on June 22, Respondent told employees that the Union had agreed to the wage cut. I do not credit this testimony. Rather I find that Respondent simply notified employees of the intended wage cut effect July 1 as provided for in the written notices to employees posted on that same date.

D. *Restoring the Wage Cut*

In the latter part of August 1993, Respondent was able to convince the State of Florida to reverse its position on the retroactive Medicaid rate change. In conjunction with Respondent's other cost cutting measures, Respondent determined in early October that it would be able to restore the wage rates previously cut. By memo dated October 7, Morrel notified employees that the wage cut was being restored the following day. It is undisputed that Respondent restored the wage cut unilaterally, without giving the Union any prior notice or offering to bargain over this. What Respondent did do was, at the same time, on October 7, write to Union International Representative Ed Chambers proposing a general wage increase, including an increase in starting rates. After describing the proposed increase, Respondent stated:

> If you believe that we should not give such an increase, please advise us immediately and we will not implement the increase. However, unless we receive your objection by October 20, 1993, we will implement the proposed increase by October 22, 1993.

By letter dated October 19, Union International Representative Chambers wrote back to Morrel informing Respondent it was ''unable to accept'' Respondent's offer to increase wage rates.

By letter dated November 2, 1993, Morrel responded in part: ''I am extremely disappointed that you would deny our employees a wage increase.''

In late October or early November, Morrel also met with employees and told employees that the Union had denied the Company's proposal to grant a wage increase. At about that same time, Respondent posted at each facility the letters in which Respondent offered a wage increase, the Union's response, and Respondent's answer.

E. *Respondent's Alleged Refusal to Meet with the Union*

On November 2, 1993, Local Union Secretary-Treasurer Gary Parody telephoned Respondent's attorney, Robert Rasch, and left a message requesting a meeting with Respondent. Rasch immediately responded by letter dated November 4 that Respondent was unavailable until after November 22. Rasch then went on to state: ''Since my client's operating funds are very slim, we need to ensure that we can expect some movement in the next meeting to cost justify committing to additional expenses associated with such a meeting.'' Elsewhere the letter stated: ''We see no sense in meeting for meeting's sake unless we can expect some real, significant movement toward agreement on your part.'' The letter concluded:

> We have a number of issues to discuss yet in these negotiations. However, as the terms and conditions of employment at Oakview and Alachua are not the same, you are seeking the best of both worlds and have steadfastly refused to consider any reductions at Oakview to bring the two units in line.
>
> If you continue to steadfastly hold to these positions, it seems a meeting is a waste of my client's money that would be better served paying creditors bills to ensure

> the future of the facility, and thereby better secure the jobs of the people you are supposed to represent.
>
> We are not hereby refusing to meet, but merely asking for some meaningful indication of a willingness to compromise rather than continuing the current fruitless banter.

Counsel for the General Counsel argues that Rasch's letter constitutes an unlawful condition precedent to further bargaining by insisting that the Union concede on one or more of its substantive positions before Respondent would agree to meet. Neither counsel for the General Counsel nor the Union dispute the substance of Rasch's letter, however, that the Union was holding steadfastly to certain demands and the parties were far from agreement.

Parody waited an entire month before responding to Rasch's letter. On December 9, Parody telephoned Rasch's office and requested a meeting be scheduled for either December 21 or 22. Rasch returned Parody's call immediately. Rasch informed Parody that a meeting during Christmas week was impossible, but specifically suggested a meeting in early January. Rasch asked about the Union's position on several issues. Parody agreed to determine what its current position was and to get back to Rasch after the first of the year. During January, however, Parody never called Rasch back, according to Parody because International Representative Chambers said he would do so. The record is devoid of any evidence, however, that Chambers ever asked for another meeting with Respondent, and none was held.

F. *Respondent's Alleged Solicitation of Employees to Revoke the Union*

Norine Lopez, the union stewardess at Alachua, testified that in several CNA in-service meetings around Halloween and Thanksgiving 1993, Mary Edwards made statements to employees that without the Union, employees would be getting better wages and more raises. Lopez testified that Director of Nurses Sharon Mayes and Assistant Director of Nurses Angela Hack were both present and both nodded their heads in agreement with Edwards.

The complaint alleges that Edwards is a supervisor and/or agent of Respondent within the meaning of the Act. At the close of his case-in-chief, however, counsel for the General Counsel conceded the evidence does not support a finding that Edwards is a supervisor, a concession with which I am in complete agreement. Counsel for the General Counsel now relies on the allegation that Director of Nurses Mayes and Assistant Director of Nurses Hack were both present and nodded their agreement with Edwards, thereby adopting Edwards' remarks and making Edwards their agent.

Lopez was the only witness called by counsel for the General Counsel in its case-in-chief to testify concerning Edwards' alleged comments. As counsel for the General Counsel concedes in its posttrial brief, ''Lopez was visibly nervous and unquestionably had some difficulties with testifying.'' After Respondent called Edwards, Mayes, and several employee witnesses, all of whom credibly denied Lopez' testimony, counsel for the General Counsel called Kasinal Lee as a rebuttal witness to try to buttress Lopez' testimony. Although Lee was an assertive and self-assured witness, I do not find her testimony particularly reliable. It was Lee, for example, who testified that Respondent told employees in group meetings the Union had agreed with Respondent's 5-percent wage cut. Although this was supposedly said in group meetings, no other witness proffered such testimony. Although I have no doubt Lee was trying her best to be completely truthful, I find details of her testimony unreliable.

The same may be said of Lopez. In her affidavit given to a Board agent shortly before the hearing, Lopez claimed that in several in-service training sessions that occurred during the fall of 1993, Edwards told employees ''they should kick the Union out.'' In her affidavit, Lopez did not claim that either Director of Nursing Mayes or Assistant Director of Nursing Hack were even present. Lopez' affidavit claims only that in a January 1994 meeting were Mays and Hack present and nodding their heads in agreement with Edwards. Lopez also testified that in this January 1994 meeting, Edwards told employees that it was too bad certified nursing assistants could not earn better wages, and they would be better off without the Union so that they could get raises. Lopez alleged that Director of Nursing Mayes and Assistant Director of Nurses Hack were sitting next to Edwards during the meeting, and nodded their heads in agreement with Edwards. Other facts, however, cast considerable doubt on this portion of Lopez' testimony. The record reflects that employees regularly signed in when they attended CNA in-service meetings. Indeed, Lopez claimed that she signed attendance sheets for each meeting she attended. Her signature, however, does not appear on the November 1993 CNA meeting notes. Director of Nursing Mayes is noted as attending the November meeting, but neither Director of Nursing Mayes nor Assistant Director of Nursing Hack are listed as attending the January 1994 meeting.

Director of Nurses Sharon Mayes had resigned and no longer worked for Respondent at the time of the trial here. Mayes denied that Edwards ever said anything during in-service meetings about the Union. Mayes testified that Edwards did not say employees would be better off without a Union, did not say that employees would get more raises without a union, and did not say employees should get rid of the Union. Mayes, who testified that she had not even talked with Respondent's counsel before testifying, was very much at ease and very credible. Edwards and Hack were also both very credible, and both denied the remarks attributed to Edwards by Lopez. I credit that testimony, and find that Edwards did not make the remarks attributed to her by Lopez. Further, I find that neither Mayes nor Hack said or did anything to adopt any such remarks by Edwards, and I shall dismiss those allegations in the complaint.

The complaint alleges and counsel for the General Counsel contends that during October, November, and December 1993 at Respondent's Oakview facility, Administrator Lyle Wilcox and Activities Director Robert Crooms solicited employees to revoke the Union. The only witness proffered by counsel for the General Counsel to support these allegations was Annie Monroe. Monroe worked for Respondent from March 1992 until she was discharged in January 1994. There is no allegation that Monroe's discharge violated the Act.

Monroe testified that although she could not remember when the meetings occurred, Oakview Administrator Wilcox told employees during group meetings that ''he could not give them a raise on account of the Union was carrying into the [F]ederal court for something and the Union was suing them, so he told the employees that they can't get nothing

until after court.'' Not only is Monroe the only employee out of all those who work at Oakview to testify that Wilcox made such a statement, Respondent called three employee witnesses who disputed Monroe's testimony. Employee Carol Mitchell testified credibly she observed that, in fact, any time an employee approached Wilcox in any of the staff meetings concerning any subject dealing with the Union, Wilcox told them that he was not at liberty to discuss it.

Monroe testified that Activities Director Crooms met with her privately three or four times to ask Monroe to circulate a petition among employees to get rid of the Union. Monroe testified that there were approximately 3 or 4 days between each of these meetings, and that the last meeting occurred shortly before Christmas 1993. According to Monroe, in the first meeting Crooms telephoned the Board and asked what needed to be done to get rid of the Union. According to Monroe, Crooms then received a letter from the Board that he gave to Monroe which stated that a majority of certified nurse assistants needed to sign a petition saying they wanted to get rid of the Union. In the third meeting, according to Monroe, Crooms gave Monroe a brown envelope containing the names of all employees. Crooms supposedly instructed Monroe to have employees sign a petition saying they no longer wanted the Union. Monroe testified that in the fourth meeting, Crooms stated that whatever she did, she was not to mention Crooms because it could jeopardize his job and Wilcox' job as well. I find it most interesting that Monroe very carefully and deliberately placed the timing of these conversations with Crooms in December 1993, because it was approximately then that a petition was in fact circulated among employees expressing disaffection with the Union. Monroe's timing of her conversations with Crooms is particularly helpful to counsel for the General Counsel and damaging to Respondent because in this proceeding counsel for the General Counsel is attacking the viability of this disaffection petition inasmuch as it was later relied on by Respondent to withdraw recognition from the Union.

Monroe testified that after Crooms gave her petitions to get signed by other employees, he later asked for them back. According to Monroe, she told Crooms they were in the trunk of her car, and she never gave them back. Monroe testified that she never solicited any employee signatures on the forms. When Monroe testified that she had never given the forms back to Crooms, I later pressed Monroe as to the whereabouts of those petitions. Monroe told me that her car had gotten lost, and that she had gotten in a wreck, and that she did not ever get the petitions out of the trunk.

Monroe went on to testify that after her conversations with Crooms, and her failure to circulate a disaffection petition, Monroe was later told by employee Don Pendlebury that Crooms had asked Pendlebury to circulate such a petition. Counsel for the General Counsel fully understood the importance of Monroe's testimony regarding Pendlebury to his case. Indeed, in his posttrial brief, counsel for the General Counsel states:

> Monroe's testimony was very damaging to Respondent. . . . Most damaging was Monroe's testimony regarding Don Pendlebury, his circulation of a disaffection petition, what prompted Pendlebury to seek signatures, and that Pendlebury was solicited to circulate the petition by Robert Crooms . . . .

Crooms specifically denied ever soliciting Pendlebury to circulate a petition among employees expressing dissatisfaction with the Union.

The importance of Pendlebury as a possible witness was very clear to counsel for the General Counsel, who represented to me and Respondent's counsel that he had conducted an exhaustive search for Pendlebury, and that Pendlebury's whereabouts were completely unknown. Near the conclusion of counsel for the General Counsel's case, Respondent asked for a reasonable adjournment to try to locate Pendlebury and other potential witnesses who no longer worked for Respondent. I discussed with counsel for the General Counsel and counsel for Respondent the fact that I was considering giving Respondent's counsel what would have been approximately a 10-day break from Thursday until a week from the following Monday for this purpose. Counsel for the General Counsel objected strenuously to giving Respondent that much time to locate Pendlebury. He even threatened to take a special appeal to the Board if that much time was granted. Largely in order to appease counsel for the General Counsel, I granted Respondent an adjournment only from Thursday until the following Tuesday to locate Pendlebury and these other additional witnesses who no longer worked for Respondent. When we resumed on that next Tuesday, I learned that not only had Respondent been able to locate Pendlebury, but that in fact within 24 hours of adjourning on the previous Thursday, counsel for the General Counsel had located Pendlebury and spoken to him by telephone. Counsel for the General Counsel, however, made no effort to call Pendlebury as a witness. Respondent similarly decided not to call Pendlebury. Now, both counsel for the General Counsel and Respondent argue that an adverse inference should be drawn against the other for not calling Pendlebury.

Considering all the facts, I agree with Respondent that it is counsel for the General Counsel who should bear the consequences of not calling Pendlebury as a witness. I note first that Monroe's testimony concerning Crooms allegedly soliciting Pendlebury to promote a disaffection petition was clearly hearsay. As the trier of fact I could refuse to rely on it for that reason even if it were undisputed, which clearly it is not. Of particular concern to me as the trier of fact, however, is that by all appearances counsel for the General Counsel tried to hide Pendlebury as a witness from Respondent and from the court. He first claimed to have made an exhaustive and unsuccessful search for Pendlebury. Yet, when I indicated some willingness to give Respondent a reasonable period to locate Pendlebury, counsel for the General Counsel objected strenuously. When a much briefer period was given, it turned out that not only was Respondent able to locate Pendlebury, but counsel for the General Counsel was able to locate him and speak to him by telephone within 24 hours of my adjourning this case. That Respondent would not have wanted to call Pendlebury makes complete sense, since Respondent had discharged Pendlebury in November 1993, and no doubt felt it had reason to consider Pendlebury somewhat biased against Respondent.

There is absolutely no logical reason, however, why counsel for the General Counsel would not have sought to call Pendlebury as a witness to support and substantiate firsthand the hearsay testimony offered by Monroe, unless, of course, Pendlebury could not and would not substantiate Monroe.

Counsel for the General Counsel advanced no reason for not calling Pendlebury. The only possible reason counsel may advance for not calling Pendlebury is the undisputed fact that Pendlebury did circulate a disaffection petition. This fact standing alone, however, does not necessarily evidence bias against the Union or an unwillingness to testify truthfully. The significance of Monroe's testimony as it relates to Pendlebury is not that he circulated a disaffection petition, but that he was solicited to do so by Respondent. If that were the case, and Respondent then turned around and discharged him, as it did on November 2, Pendlebury would have every reason to want to testify on behalf of counsel for the General Counsel. Considering all of the above, I therefore conclude that an adverse inference should be drawn against counsel for the General Counsel for not calling Pendlebury as a witness, and I conclude that if he had been called, Pendlebury would not substantiate and corroborate Monroe's testimony.

In addition to Monroe's testimony concerning remarks allegedly made by Administrator Wilcox during group meetings of employees at Oakview, Monroe also testified that in similar group meetings, Activities Director Crooms told employees that ''They did not need the Union, they ain't gonna do us no good, and you know, we should vote them out and if we vote them out we will get a raise.'' Crooms credibly denied that he made any such statement. I note that in Monroe's affidavit to the Board dated March 30, 1994, Monroe claimed that these statements were made to her by Crooms in her office during the private meetings in December 1993. Even though much of her testimony appeared well rehearsed, I must agree with counsel for Respondent that Monroe apparently had some difficulty keeping her stories straight.

In short, Monroe's credibility left much to be desired. On the subjects covered by counsel for the General Counsel in her direct testimony, Monroe appeared well rehearsed. On other subjects, however, such as the circumstances surrounding her discharge, Monroe impressed me as simply trying too hard to appear casual and objective. Monroe repeatedly claimed that although she was discharged by Respondent, she accepted that rather stoically and dispassionately. The testimony of numerous witnesses proffered by Respondent shows conclusively, however, that Monroe was extremely upset by her discharge, eventually had to be asked to leave Respondent's premises, and vowed as she was leaving, ''I will get you all for this.'' There is no doubt in my mind that Monroe testified spitefully for revenge against Respondent. I am convinced that Monroe altered, stretched, and where necessary fabricated testimony to support counsel for the General Counsel's case. I am left with the perplexing difficulty of wondering where there might be specific kernels of truth encased within and overlaid by half-truth and outright fabrication. In the end, I find myself left with little of Monroe's testimony that can be relied on to support counsel for the General Counsel's case.

Crooms on the other hand provided a very credible account of his conversations with Monroe. Crooms testified very candidly and credibly that sometime around the end of July 1993, Monroe approached him and said that she wanted to talk about the Union. Monroe told Crooms that there was a lot of talk and that employees wanted the Union out. Monroe asked Crooms how employees could get rid of the Union. Crooms admitted looking up in the telephone book the state agency in Florida that he thought had jurisdiction over such matters. Crooms also admits he then dialed the telephone number for Monroe and handed her the telephone. Monroe became so nervous she hung up. Crooms then dialed the number again and again handed Monroe the telephone. Crooms overheard Monroe give the person to whom she was speaking Monroe's home telephone number and address. Approximately 4 or 5 days later, Monroe brought Crooms an envelope from the Florida Public Employees Relations Commission addressed to Monroe at her home. Crooms still had this envelope, which was postmarked August 5, 1993, and it was introduced as an exhibit by Respondent. The envelope contains a blank form entitled a ''Petition to Revoke Certification.'' Crooms testified credibly that Monroe asked him to interpret the form, which he did. Crooms testified that he kept the document when Monroe did not ask for it back. Crooms candidly admitted that he kept the letter because he did not want it to get out that he had any part in Monroe contacting the State of Florida. Crooms credibly testified that this was the only help he gave to Monroe or anyone else with regard to ousting the Union.

I found Crooms utterly candid and credible in describing these conversations with Monroe. The evidence shows that these conversations occurred much earlier than claimed by Monroe, and long before the disaffection petition circulated by other employees. I credit Crooms that it was Monroe who approached him both in the initial conversation and after receiving the petition from the Florida Public Employees Relations Commission. I also credit Crooms regarding the substance of his conversations with Monroe.

G. *Employee Petitions*

On December 17, 1993, Respondent posted notices to employees that stated:

> On October 7, 1993, National Medical Associated, [sic] Inc. offered its most deserving bargaining unit employees a .15 cents to .20 cents an hour increase. This wage increase was denied on October the 19th, 1993 by the UFCW Local 1625. I apologize for their insensitivity.
>
> This money had been set aside for pay raises so, please accept this as notice that this money will be utilized as a pay raise of .15 cents per hour for all other . . . employees retroactive to December 15th, 1993. We appreciate your loyalty and the quality of your performance. Merry Christmas and a Happy New Year.

At about this same time, disaffection petitions began circulating at Alachua and Oakview.

On or about January 18, 1994, Alachua Administrator Edward Coop received a petition with 48 signatures indicating these persons no longer wanted to be represented by the Union. The testimony is uncontroverted that Coop verified the signatures against payroll records and determined that a majority of the employees in the bargaining unit had signed the petition.

On January 26, 1994, Oakview Administrator Lyle Wilcox received a similar petition from employees. Wilcox testified that when he analyzed the petition, he concluded that approximately 70 percent of bargaining unit employees had

signed. Although counsel for the General Counsel disputes the exact percentage figures obtained by Respondent, counsel for the General Counsel does not dispute the fact that a majority of employees at each of the two facilities signed these disaffection petitions.

Counsel for the General Counsel spent considerable time trying to prove that the employee or employees at Oakview who circulated the disaffection petition were supervisors within the meaning of the Act. That effort failed, and counsel for the General Counsel eventually conceded the evidence does not establish that any of these individuals are supervisors within the meaning of the Act. Counsel for the General Counsel next tried to attack the Oakview petition as having been generated by Respondent. The record reflects that one employee, Tracey Roberts, who was involved in circulating the petition, went to a payroll clerk and asked this clerk to make a list of names of the people who worked at the facility. Although the payroll clerk did so, there is no evidence that the payroll clerk knew anything about how this list was going to be used. Once the list was obtained, Roberts and other employees used it to approach fellow employees and seek their signatures on a disaffection petition. There is no evidence whatever that either the payroll clerk or any supervisors participated in circulating the disaffection petition among employees. There is absolutely no indication that the minimal assistance provided by the payroll clerk had anything to do with Roberts' decision to distribute the petition.

H. *Withdrawal of Recognition and Wage Increases*

The Union's certification by the Board as representative of employees at the Oakview facility had been issued on March 4, 1993. Respondent waited until after the expiration of the certification year, and on March 9, 1994, Respondent faxed a letter to the Union at 10:30 a.m. withdrawing recognition at both Oakview and Alachua.

On March 9, at 2:30 p.m., Morrel met with employees at the Alachua facility and advised them that he had withdrawn recognition from the Union. The following day, Morrel announced the same thing to the Oakview employees. When Respondent met with employees, after it had withdrawn recognition from the Union, Respondent also announced changes in compensation, including a 15-cent-per-hour increase and a bonus plan. This was the same increase that had been offered by Respondent and turned down by the Union in October 1993.

Analysis and Conclusions

Counsel for the General Counsel argues that the wage cut instituted by Respondent on July 1, 1993, violated Section 8(a)(1) and (5) of the Act first because Respondent instituted the cut without having reached a good-faith impasse in negotiations with the Union. Second, counsel for the General Counsel argues that Respondent implemented the wage cut after failing and refusing to furnish the Union with information requested by it dealing with Respondent's alleged financial reasons for needing the cut. Third, counsel for the General Counsel argues that the wage cut, as implemented, was unlawful because it was different from that proposed by Respondent in negotiations with the Union. Respondent, of course, disagrees with each of these propositions.

Although the complaint does not specifically allege that Respondent proposed the wage cut in bad faith, this issue necessarily relates to whether or not impasse was reached between the parties in negotiations. Further, this issue is intertwined with Respondent's affirmative defense that the wage cut was a matter of business or financial necessity. As a counter to counsel for the General Counsel's argument that parties were not at impasse in negotiations, Respondent argues in its posttrial brief that the financial necessity of such a cut can serve to advance a finding that the parties were indeed at impasse. Based on the record before me, I conclude that Respondent advanced its proposal for a wage cut in good faith.

This is not a case in which Respondent proposed a wage cut in order to force an impasse, nor a case in which a wage cut proposal was advanced or implemented as soon as the collective-bargaining agreement between the parties had expired. In fact, the collective-bargaining agreement between Respondent and the Union covering employees at the Alachua facility expired on February 14, 1993. As the parties were undertaking negotiations for a new agreement, Respondent agreed to no less than five separate contract extensions, the last of which expired on June 30, 1993. From the very outset of negotiations, Respondent made it clear to the Union that it would not agree to any economic improvements because of its financial position.

Even after Respondent had taken that position in negotiations, in early May 1993 the State of Florida issued a retroactive Medicaid rate adjustment that carried a potential but nevertheless real cost to Respondent of approximately a million dollars. Respondent's accountant informed it that this liability would have to be accrued immediately as a current liability on the balance sheet, thereby adversely effecting the ratio of assets to liabilities that was already a problem and creating an immediate cash flow crisis for Respondent. Respondent then undertook numerous cost cutting measures at both facilities and directed Respondent's negotiator to initiate discussions with the Union about a wage reduction.

Discussions about a possible wage cut began during negotiation sessions that took place on May 25 and 26. How Respondent's proposal came to be characterized as a ''final offer'' in those sessions is not at all clear from the record, and I place no significance on that fact. What is significant is the Union's immediate and adamant response that under no circumstances would it agree to a wage cut. As it relates to the issue of a possible wage cut by Respondent, not a diminished wage increase or even a wage freeze but a wage cut, the Union's response was an unequivocal refusal to even consider such a possibility. The Board, with court approval, has long held that whether the parties are at impasse must be determined on a case-by-case basis, and includes consideration of ''bargaining history, the good-faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations.'' *Taft Broadcasting Co.*, 163 NLRB 475 (1967). The Board has found impasse to have been reached irrespective of the number of meetings held. See *Bell Transit Co.*, 271 NLRB 1272 (1984); *Guardian Glass Co.*, 172 NLRB 439 (1968). And in *Community Television of Southern California*, 312 NLRB 15 (1993), the Board was very careful to state, ''We disavow the implication in the

Judge's decision that an employer can never advance the date of impasse or declare an impasse on the basis of business necessity.'' It is clear to me, and I am quite sure it was the ''contemporaneous understanding of the parties'' that at least as things stood in May and June 1993, the Union simply was not willing to even consider a wage cut. Were it not for Respondent's failure to provide the Union with relevant available information as more fully discussed below, I would find that as to that issue the parties were at impasse in negotiations.

It is uncontroverted, however, that as soon as Respondent advanced its wage cut proposal because of its financial crisis, the Union immediately asked Respondent to provide it with the financial information that led Respondent to make this proposal. The complaint alleges that Respondent refused to provide the Union with this information, but in fact the record shows that Respondent agreed to supply the Union with this information. Even though the information was immediately available to Respondent, however, Respondent made no effort to provide the Union with documentation of its claim of financial distress until July 9, more than a full week after Respondent had already implemented the wage cut. Respondent argues that this alone should not make the wage cut unlawful because in negotiations, Respondent orally described and explained its financial position to the Union. Respondent argues that in view of the Union's adamant position on the wage-cut issue, it should have not been required to go through a fruitless act before being allowed to implement this cut. A wage cut, however, has a more direct, severe, and negative impact on employees than perhaps any other change in benefits. The Supreme Court specifically stated in *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956):

> Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims. . . . If an agreement is important enough to present in the give-and-take of bargaining, it is important enough to require *some sort of proof of its accuracy*. [Emphasis added.]

No one can say with any accuracy what the Union might have proposed or might have agreed to if Respondent had provided the Union here with documented proof of its financial crisis prior to implementing the wage reduction. Although the Union continued to oppose and reject a wage reduction in mid-August as evidenced by its letter to employees, it is not insignificant to note, and one can not ignore the fact, that by then the Union was faced with a fait accompli. Respondent had already imposed the wage reduction unilaterally, so of course the Union continued to oppose it. Respondent itself stresses the importance of a wage cut in view of its financial position. A wage cut with that importance to Respondent would have at least as much importance to employees and the Union that represents those employees. Proof of Respondent's financial position was something immediately available to Respondent, for it was that very information that caused Respondent to consider the wage cut in the first place. Respondent has shown no reason whatever, and indeed has not even advanced any reason, why it could not have provided the Union with the same documentary proof of its financial position as it itself relied on in making this all-important decision to reduce wages before actually implementing that decision. I therefore find that in these circumstances, ''the parties were precluded from reaching a lawful impasse at that point by the Respondent's [failure] adequately to respond to the Union's requests for financial information that would make it possible for the Union to evaluate the necessity for the Respondent's demands,'' and for Respondent to implement the wage cut without first providing the Union with the requested information violated Section 8(a)(1) and (5) of the Act. *Reece Corp.*, 294 NLRB 448, 453 (1989), and cases cited therein.

In conjunction with the fact that Respondent implemented the wage reduction before bothering to supply the Union with requested financial information, I also find significant the fact that Respondent implement a wage reduction substantially different from that proposed to the Union. Respondent attempts to minimize the differences between the wage reduction as implemented and that proposed to the Union, calling them ''a matter of semantics and a misunderstanding'' in its posttrial brief. Even a passing analysis, however, shows that the differences were anything but a matter of semantics. As proposed to the Union, Respondent's wage reduction was to last indefinitely. As implemented, however, the wage reduction had a finite expectancy of only 6 months. Even more significant, however, was the actual difference in the cut as proposed to the Union and as implemented by Respondent. The record shows unequivocally that as originally proposed to the Union, the wage cut would reduce the lowest pay rate to $4.25 per hour. As implemented, however, Respondent's minimum wage rate was $4.75 per hour. The difference of 50-cent per hour is not insignificant, a matter of semantics, or a misunderstanding. That difference of 50 cents per hour represents more than 10 percent of the lowest wage rate, or twice the amount of the proposed wage cut. To Respondent's counsel that 50 cents per hour may indeed be insignificant, but to employees in the bargaining unit, and therefore to the Union, that difference is significant indeed! The Board has long held that when an employer implements an offer following good-faith impasse reached with the Union, the implemented changes must not be substantially different or greater than that which the employer proposed during negotiations with the Union. *Atlas Tack Corp.*, 226 NLRB 222, 227 (1976), enfd. 559 F.2d 1201 (1st Cir. 1977). It has long been held that an employer violates Section 8(a)(5) of the Act when it implements changes that are better than those proposed to the Union, even if negotiations are at impasse. *NLRB v. Crompton-Highland Mills*, 337 U.S. 217 (1949); *Falcon Tank Corp*., 194 NLRB 333 (1971). I therefore find that because that Respondent implement its wage reduction without first supplying the Union with available proof of its financial position, as requested, and by implementing a wage reduction substantially different from that proposed to the Union, Respondent violated Section 8(a)(1) and (5) of the Act.[2]

The complaint alleges, and counsel for the General Counsel argues, that since November 2, 1993, Respondent has

[2] In view of this finding, the allegation that Respondent further violated Sec. 8(a)(1) and (5) of the Act by communicating directly with employees when it posted a notice implementing the wage increase becomes purely academic. Lengthy consideration of this issue would prolong this decision unnecessarily, and would not in any way effect the remedy provided. Accordingly, I decline to consider that issue.

failed and refused to meet and bargain with the Union. More specifically, the argument is advanced that by Respondent counsel's letter of November 4 to the Union, Respondent unlawfully ''set a condition precedent to further bargaining.'' Although I agree that Rasche's [sic] letter comes close to setting an unlawful condition precedent to further bargaining, I find that the letter stops just short of doing so. Further, I can not overlook the fact that later events do not support counsel for the General Counsel's position. The substantive portions of the letter are quoted above, and will not be repeated here. Neither counsel for the General Counsel nor the Union dispute the substance of Rasch's letter that the Union was holding steadfastly to certain demands and the parties were far from agreement. There is no question that attempts to place conditions on bargaining should be closely scrutinized to determine whether a proposed condition indicates bad faith. See *Borg-Warner Corp*., 356 U.S. 342 (1958); *Lustrelon, Inc*., 289 NLRB 378 (1988). Counsel for the General Counsel, however, tries to read too much into Rasch's letter to find that Respondent placed a condition on further bargaining. Rather, I believe that a more fair reading of Rasch's letter shows that he was simply trying to put pressure on the Union to make some meaningful concession. As the letter concludes, ''We are not hereby refusing to meet, but merely asking for some meaningful indication of a willingness to compromise rather than continuing the current fruitless banter.''

The record shows that the Union waited an entire month before even responding to Rasch's letter. When the Union did finally telephone Rasch on December 9 to ask for a meeting on December 21 or 22, Rasch immediately returned the Union's call and informed it that although a meeting during Christmas week was impossible, Respondent would suggest a meeting in early January. When Rasch asked about the Union's position on several issues, Union Secretary-Treasurer Gary Parody agreed to determine its current position and to get back to Rasch. During the entire month of January, however, Parody never bothered to call Rasch back, according to Parody because Union International Representative Chambers said he would do so. The record is devoid of any evidence, however, that Chambers ever asked for another meeting with Respondent. The record simply does not support the allegation that Respondent ever failed and refused to meet with the Union, that is until such time as it withdrew recognition in March 1994 as discussed below. Accordingly, I shall dismiss that allegation from the complaint.

I also reject for credibility reasons already made clear above counsel for the General Counsel's argument that Respondent through Mary Edwards, Director of Nurses Sharon Mayes, Assistant Director of Nurses Angela Hack, Oakview Administrator Lyle Wilcox, and/or Oakview Activities Director Robert Crooms solicited employees to revoke the Union, as claimed by Union Stewardess Norine Lopez and by Annie Monroe. I do find, however, based on the credited testimony of Crooms, that Crooms interfered with Monroe's Section 7 rights in one respect. Crooms admits that when Monroe approached him in July 1993 and asked how employees could get rid of the Union, Crooms not only looked up in the telephone book the number of the state agency that he thought had jurisdiction over such matters, he also dialed the telephone number for Monroe and handed her the telephone. This assistance, standing alone, may or may not have interfered with Monroe's Section 7 rights. Crooms further admits, however, that Monroe hung up the telephone. Crooms then took it upon himself to pick the phone back up, redial the number, and hand the telephone back to Monroe. By these actions, after Monroe had taken it upon herself to hang up the telephone, Crooms quite clearly was soliciting Monroe to pursue her disaffection with the Union. Accordingly, I find that Crooms interfered with Monroe's Section 7 rights in violation of Section 8(a)(1) of the Act.

I also reject altogether for reasons already made clear above Monroe's testimony regarding employee Don Pendlebery being solicited by Respondent to circulate a disaffection petition among employees. For the reasons fully expressed above, I find it is counsel for the General Counsel who should bear the consequences of not calling Pendlebery as a witness in this proceeding. I conclude that if Pendlebery had been called as a witness, he would not have substantiated and corroborated Monroe's testimony on this subject.

The complaint contains a number of separate allegations that I view as very much related: that Respondent bypassed the Union and dealt directly with employees, that Respondent engaged in a campaign to denigrate the Union in the eyes of bargaining unit employees, that Respondent participated in soliciting petitions from employees to disaffect the Union, and that Respondent unlawfully withdrew recognition form the Union, and simultaneously granted various unilateral wage increases and improvements in benefits. The complaint did not specifically allege, but Respondent's counsel was very much aware as set forth in his posttrial brief that ''throughout the hearing in this case, the General Counsel pointed to the various letters that were posted by [Respondent] on the bulletin boards at Oakview and Alachua as encouraging disaffection of the Union, thereby preventing the company from developing a good-faith doubt as to the Union's majority status.'' Respondent specifically addresses this argument in its post-trial brief. I make specific note of this because I am convinced based on the record before me that beginning with Respondent restoring the wage cut and continuing thereafter, Respondent engaged in a number of actions designed to undermine the Union as bargaining representative and to undermine support for the Union among employees. As a part of this course of conduct, Respondent engaged in a not too subtle campaign to bypass the Union and deal directly with employees, went out of its way to denigrate the Union in the eyes of employees, and thereby precipitated the disaffection petitions that circulated among employees and that Respondent later relied on to withdraw recognition from the Union.

I note first the record establishes that Respondent unilaterally restored the wage cut without even so much as giving the Union advance notice, much less offering to sit down and bargain with the Union over this. Instead, by memo dated October 7, Respondent simply notified employees that the wage cut was being restored the following day. At the same time, on October 7, Respondent also wrote to the Union proposing a general wage increase, which it notified the Union would become effectively automatically on October 22 ''unless we receive your objection by October 20.'' Respondent's letter did not even bother to tell the Union that the wage cut was being or had been restored, and offered the Union this general wage increase in such a take-it-or-leave-it manner that it offered the Union no real opportunity to bargain on this issue either. When the Union declined to agree to the

take-it-or-leave-it offer, Respondent immediately wrote back to the Union saying it was ''disappointed'' the Union would ''deny our employees a wage increase,'' and then immediately went on to post all correspondence related thereto for viewing by unit employees. Both the tenor of Respondent's correspondence and posting it for viewing by unit employees were obviously designed to undermine support for the Union among employees.

If there could ever have been any doubt about Respondent's all too transparent effort to undermine the Union, it is completely eliminated by Respondent's December 17 memo to employees. In that memo, C.E.O. Morrel first reminded his ''most deserving employees'' that he had offered them a raise. Morrel then goes on to blame the Union, stating that ''this wage increase was denied by the [Union].'' Not to miss this opportunity to belittle the Union, Morrel states: ''I apologize for their insensitivity.'' As if this were not enough, Morrel then goes on to tell these ''most deserving employees'' that thanks to the Union, Respondent will give the money they might have gotten as a raise to ''all other . . . employees.'' Morrel cleverly ends with a cheery ''Merry Christmas'' to punctuate his slap in the face not only to the Union, but the obvious stupidity of the employees themselves for having this Union to represent them. I find it significant indeed it was about this same time that disaffection petitions began circulating in earnest at both Alachua and Oakview.

All of these acts considered as a whole, beginning with Respondent unilaterally restoring the wage cut, simultaneously offering the Union a wage increase on very short notice and in a take-it-or-leave-it manner, coupled with Respondent denigrating the Union for ''denying our employees a wage increase,'' and culminating with Respondent's all too transparent memo of December 17, Respondent undertook an intentional, premeditated course of action designed to undermine the Union as bargaining representative and undermine support for the Union among employees. As a part of this course of action, Respondent went out of its way to denigrate the Union, and engaged in a not too subtle campaign to bypass the Union and deal directly with employees, in violation of Section 8(a)(1) and (5) of the Act. I find that this course of action was designed to, and did in fact, precipitate the disaffection petitions that circulated among employees, and that Respondent later relied on to withdraw recognition from the Union. I find that Respondent's bad-faith course of action violated Section 8(a)(1) and (5) of the Act, including Respondent's withdrawal of recognition from the Union.

Counsel for the General Counsel also attacks the employee disaffection petitions themselves on a number of grounds. First, counsel for the General Counsel contends that the disaffection petitions were solicited by Respondent as evidenced by the testimony of Norine Lopez and Annie Monroe. For reasons explained above, I reject that argument. Counsel for the General Counsel also spent considerable time trying to prove that the employee or employees at Oakview who circulated the disaffection petition that was signed in December 1993 were supervisors within the meaning of the Act. For reasons already described above, that effort also fails. Counsel for the General Counsel also attempts to attack the Oakview petition because one employee, who was involved in circulating the petition went to a payroll clerk, asked for and received a list of names of the people who worked at the Oakview facility. There is simply no evidence, however, that the payroll clerk knew anything about how this list was going to be used. Nor is there any evidence that either the payroll clerk or any supervisors participated in circulating the disaffection petition among employees. I find that the minimum assistance given by the payroll clerk in these circumstances does not violate Section 8(a)(1) of the Act. *Safeway Trails, Inc*., 216 NLRB 951, 961 (1975).

In his posttrial brief, counsel for the General Counsel advances a number of additional arguments why the employee disaffection petitions could not have been properly relied on by Respondent to withdraw recognition, including an argument that since the petitions were circulated and signed in December 1993, Respondent failed to show that in March 1994 when recognition was withdrawn that the Union did not, in fact, enjoy majority status. Although I have considerable doubt about counsel for the General Counsel's argument as expressed in its posttrial brief, I find it unnecessary to specifically consider each of the arguments advanced concerning the employee petitions because I agree with counsel for the General Counsel, for reasons already detailed above, that Respondent was not free to rely on those petitions to support a withdrawal of recognition of the Union. I find that Respondent's course of bad-faith conduct designed to undermine the Union and to undermine support for the Union among employees in fact precipitated the disaffection petitions. Accordingly, Respondent is not now able to point to those same petitions as a basis for withdrawing recognition from the Union.

The facts are uncontroverted that when Respondent withdrew recognition from the Union in March 1994, it simultaneously announced unilateral changes in compensation and benefits for employees at both Alachua and Oakview. Because I have found that Respondent precipitated the employee petitions through a course of bad-faith conduct designed to undermine the Union, it follows that Respondent's unilateral changes in wages and benefits violated Section 8(a)(1) and (5) of the Act, and I so find.

CONCLUSIONS OF LAW

1. The Respondent, National Medical Associates, Inc. d/b/a Alachua Nursing Center and Oakview Regional Care Center is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers Union, Local 1625, AFL–CIO is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent implemented a wage cut unilaterally without first providing the Union with requested financial information that Respondent relied on to draw its conclusion that such a cut was a business necessity, and Respondent thereby violated Section 8(a)(1) and (5) of the Act.

4. Respondent implemented a wage cut unilaterally that was substantially different from that proposed to the Union, and Respondent thereby violated Section 8(a)(1) and (5) of the Act.

5. Respondent did not fail and refuse to meet with the Union by unlawfully setting a condition precedent to further bargaining as alleged in the complaint, and that allegation is dismissed.

6. Respondent did not through Mary Edwards, Director of Nurses Sharon Mayes, or Assistant Director of Nurses Angela Hack solicit employees to revoke the Union as alleged in the complaint, and those allegations are dismissed.

7. Respondent did not through Oakview Administrator Lyle Wilcox solicit employees to revoke the Union as alleged in the complaint, and that allegation is dismissed.

8. Respondent, acting through Oakview Activities Director Robert Crooms solicited an employee to revoke the Union, and Respondent thereby violated Section 8(a)(1) of the Act.

9. Respondent engaged in a course of action designed to undermine the Union as bargaining representative of its employees, which included unilaterally restoring the wage cut to employees without giving the Union any advance notice and without offering to bargain over this matter; simultaneously offering the Union a wage increase on short notice and in a take-it-or-leave-it manner; bypassing the Union and dealing directly with employees; and engaging in a campaign to denigrate the Union in the eyes of bargaining unit employees; and thereby precipitated disaffection petitions among employees, which Respondent later relied on to withdraw recognition from the Union; and Respondent thereby violated Section 8(a)(1) and (5) of the Act.

10. Respondent unilaterally granted employees improvements in wages and benefits after unlawfully withdrawing recognition from the Union, and Respondent thereby violated Section 8(a)(1) and (5) of the Act.

11. The unfair labor practices that Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, National Medical Associates, Inc. d/b/a Alachua Nursing Center and Oakview Regional Care Center, Gainesville and Williston, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Implementing unilateral wage cuts without first providing United Food and Commercial Workers Union, Local 1625, AFL–CIO with requested financial information that Respondent relies on to draw a conclusion that such a cut is a business necessity.

(b) Implementing wage cuts unilaterally that are substantially different from that proposed to the Union.

(c) Soliciting employees to revoke the Union.

(d) Engaging in a course of action designed to undermine the Union as bargaining representative of its employees, including unilaterally restoring wage cuts to employees without giving the Union advance notice and offering to bargain over such matters; offering the Union wage increases on short notice and in a take-it-or-leave-it manner; bypassing the Union and dealing directly with employees; and/or engaging in a campaign to denigrate the Union in the eyes of bargaining unit employees.

(e) Unlawfully withdrawing recognition from United Food and Commercial Workers Union, Local 1625, AFL–CIO, the appropriate bargaining representative of its employees.

(f) Unilaterally granting employees improvements in wages and benefits after unlawfully withdrawing recognition from the Union.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with United Food and Commercial Workers Union, Local 1625, AFL–CIO regarding wages, hours, and working conditions of our employees in the following appropriate bargaining units:

AT ALACHUA:

> Employees that perform work as certified nurse aids, non-certified nurse aids, dietary aids, cooks, housekeepers and laundry persons, but excluding all other employees.

AT OAKVIEW:

> All full time and regular part-time certified nurse aids, non-certified nurse aids, dietary aids, cooks, house-keepers and laundry aids; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

(b) Make whole all employees for any loss of earnings or any other benefits they may have suffered by reason of the unlawful unilateral reduction in wages by paying them a sum of money equal to the amount they normally would have earned but for such changes, with backpay to be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus appropriate interest.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Alachua and Oakview facilities copies of the attached Notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 12,

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.